

Supreme Court of the United States

OCTOBER TERM, 1960

No. 834

JOHN MACHIBRODA, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Original Print

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[fol. 1]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

No. 10345 (18 USC, 2113(a) & (d))

UNITED STATES OF AMERICA

v.

**JOHN MACHIBRODA, with aliases, & MARVIN FERRIS BRETON,
with aliases**

WAIVER OF INDICTMENT—February 17, 1956

John Machibroda, the above named defendant, who is accused of violating the laws of the United States relative to entering an insured bank with intent to commit a felony, to-wit: larceny of property belonging to said bank; and taking and carrying away money in the custody and control of an insured bank by jeopardizing the lives of the employees of said bank by the use of dangerous weapons, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

/s/ John Machibroda
Defendant

/s/ Ray Limpston
Witness

/s/ John J. Schuchman
Counsel for Defendant

Date Feb. 17, 1956.

[fol. 2]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

[Title omitted]

MINUTE ENTRY OF FEBRUARY 17, 1956

Attorney for Defendant—John J. Schuchman (Mach.) &
McCullough (Broda)

Defendant waived an attorney
Defendant arraigned, plea of entered.
Plea of not guilty withdrawn, plea of
entered.

Bond \$50,000)
) ✓ Bond continued.

..... Referred for pre-sentence report.
..... Committed..... Temporary Commitment.
..... Passed for sentence.

SENTENCE—

Imposition of sentence deferred, placed on probation
for years.

Y.O. Act..... SENTENCE, committed under
Sec. 5010(b), T. 18, U.S.C.

..... SENTENCE, committed under
Sec. 5010(e), T. 18, U.S.C.
for a term of

..... ORDER committing defendant for obser-
vation and study under Sec. 5010(e),
T. 18, U.S.C.

Upon motion of the United States Attorney,
Count dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 3]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

[Title omitted]

MINUTE ENTRY OF PLEA—Feb. 24, 1956

Attorney for Defendant—John J. Schuchmann

Defendant waived an attorney

Defendant arraigned, plea of Guilty entered.

Plea of not guilty withdrawn, plea of
entered.

Bond \$.....) ✓ Bond continued.

..... Referred for pre-sentence report.

..... Committed..... Temporary Commitment.

..... Passed for sentence.

SENTENCE—Imposition of sentence deferred, placed on probation
for years.Y.O. ACT..... SENTENCE, committed under
Sec. 5010(b), T. 18, U.S.C...... SENTENCE, committed under
Sec. 5010(c), T. 18, U.S.C.
for a term of ORDER committing defendant for obser-
vation and study under Sec. 5010(e),
T. 18, U.S.C.Upon motion of the United States Attorney,
Count dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Criminal No. 10345

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA, DEFENDANT

MINUTE ENTRY OF JUDGMENT—May 23, 1956

Attorney for Defendant

Defendant arraigned, plea of guilty entered. 2/24/56.

Plea of not guilty withdrawn, plea of entered.

Bond

.....Committed.

.....Referred for pre-sentence report.

.....Passed for sentence.

Judgment—Count I 20 yrs concurrently

Count II 25 yrs

and no costs assessed.

Judgment, imposition of sentence suspended, placed on
probation for years, and no costs assessed.

Order, upon motion of United States Attorney,
Counts dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10345 Criminal

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

JUDGMENT AND COMMITMENT—May 23, 1956

On this 23rd. day of May, 1956 came the attorney for the government and the defendant appeared in person and ¹ by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of ² guilty of the offense of entering a bank with intent to commit a felony and larceny and armed robbery of a State Savings Bank insured by Federal Deposit Insurance Corporation, as charged ³ and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ⁴ twenty-five (25) years on Count II of the information and twenty (20) years on Count I of the information, to be served concurrently with the sentence imposed on Count II of the information.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank L. Kloeb
United States District Judge

The Court recommends commitment to: *

Clerk

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

[fol. 5-A] [File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

No. 10348 (18 USC, 2113(a) & (d))

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA, with aliases

WAIVER OF INDICTMENT—February 24, 1956

John Machibroda, the above named defendant, who is accused of violating the laws of the United States relative to entering an insured bank with intent to commit a felony, to-wit: larceny of property belonging to said bank; and taking and carrying away money in the custody and control of an insured bank by jeopardizing the lives of the employees of said bank by the use of a dangerous weapon, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

/s/ John Machibroda
Defendant

/s/ Ray Limpston
Witness

/s/ John J. Schuchmann
Counsel for Defendant

Date Feb. 24, 1956

[fol. 5-B]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

INFORMATION—Filed February 24, 1956

The United States Attorney charges that:

COUNT I.—18 USC, 2113(a)

On or about November 22nd, 1955, at Forest, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, entered the First National Bank of Forest, with intent to commit in such bank a felony, in violation of the statutes of the United States, to-wit: larceny of property belonging to and in the care, custody and control of the said bank, the said First National Bank of Forest being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposits thereof being insured.

COUNT II.—18 USC, 2113(d)

On or about November 22nd, 1955, at Forest, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, by force and violence and by putting in fear and jeopardizing the lives of the employees of the First National Bank of Forest, by the use of a dangerous weapon, to-wit: a revolver, unlawfully and feloniously took and carried away, with intent to steal and purloin, property or money in the custody and control of said bank of a value exceeding \$100.00, to-wit: approximately \$10,436.37, the said First National Bank of Forest being then and there an insured bank of the Federal Deposit Insurance Corporation and the deposits thereof being insured.

/s/ Clarence M. Condon,
Assistant United States Attorney

[fol. 5-C] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF PLEA—February 24, 1956

Attorney for Defendant—John Schuchmann

Defendant waived an attorney

Defendant arraigned, plea of Guilty entered.

Plea of not guilty withdrawn, plea of
entered.

Bond \$.....) ✓ Bond continued.

..... Referred for pre-sentence report.

..... Committed..... Temporary Commitment.

..... Passed for sentence.

SENTENCE—

Imposition of sentence deferred, placed on probation
for years.

Y.O. Act..... SENTENCE, committed under
Sec. 5010(b), T. 18, U.S.C.

..... SENTENCE, committed under
Sec. 5010(c), T. 18, U.S.C.
for a term of

..... ORDER committing defendant for obser-
vation and study under Sec. 5010(e),
T. 18, U.S.C.

Upon motion of the United States Attorney,
Count dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5-D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF JUDGMENT—May 23, 1956

Attorney for Defendant—John Schuchmann

Defendant arraigned, plea of guilty entered. 2/24/56.

Plea of not guilty withdrawn, plea of entered.

Bond

.....Committed.

.....Referred for pre-sentence report.

.....Passed for sentence.

Judgment—Count I 15 years) conc. consec. to Count II
Count II 15 years) 10345 total (40 yrs)

and no costs assessed.

Judgment, imposition of sentence suspended, placed on
probation for years, and no costs assessed.

Order, upon motion of United States Attorney,
Counts dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5-E] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10348 Criminal

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

JUDGMENT AND COMMITMENT—May 23, 1956

On this 23rd. day of May, 1956 came the attorney for the government and the defendant appeared in person and¹ by counsel,

It Is ADJUDGED that the defendant has been convicted upon his plea of² guilty of the offense of entering a bank with intent to commit a felony and larceny of property and armed robbery of a National Bank insured by Federal Deposit Insurance Corporation, as charged³ and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ fifteen (15) years on each of Counts I and II of the information, to be served concurrently with each other, but to be served consecutively with the sentence imposed in Case No. 10345 Criminal. (Total sentence forty (40) years.)

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank L. Kloebe
United States District Judge

The Court recommends commitment to:⁶

Clerk

[fol. 6] • • • •

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

[fol. 7]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Cases Nos. 10345-10348

JOHN MACHIBRODA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO VACATE SENTENCES (Title 28 U.S.C.A. § 2255)
Filed Feb. 9, 1959

Comes now *John Machibroda* and prays that the sentences imposed in this Court on May 23, 1956, in cases numbered 10345 and 10348, by the Honorable Frank L. Kloeb, be vacated and set aside on the ground that they were imposed in violation of the laws and Constitution of the United States, for the following reasons, among others, to wit:

1. The waiver of indictment in case No. 10348 and Pleas of Guilty in Cases Nos. 10345 and 10348 were Obtained In Violation Of Petitioner's Right to due process of law in that he was overreached by an Assistant United States Attorney who misrepresented to the Petitioner that in consideration for said waiver and pleas he would not be sentenced to a term in the Excess of twenty (20) years in both cases, Nos. 10345 and 10348.
- [fol. 8] 2. The petitioner was coerced by an official of the United States Attorney's Office by means of a threat not to inform his attorney and the Court of the promise of a twenty (20) year sentence in return for his waiver of indictment and Pleas of Guilty.
3. The Court failed to act in Conformity with Rule 11, Fed. Rule Crim. Proc. at the time it excepted the Pleas of Guilty.

4. The Court failed to act in Conformity with Rule 32(a) at the time of imposition of the sentences.

The Petitioner files herewith his affidavit made in support hereof.

STATEMENT OF FACTS SURROUNDING
PETITIONER'S ALLEGATIONS

The petitioner on February 17, 1956 appeared in this Court in the matter of waiver of indictment in an alleged Waterville, Ohio, bank robbery. The petitioner was not represented by his Attorney at the time the waiver of [fol. 9] indictment was executed. At that proceeding *petitioner's attorney advised the Court that it was not likely that the petitioner would enter a plea to the Waterville information or to the other charge the government was then contemplating filing.* At that proceeding the Court suggested that a plea of not guilty be entered in the case of a co-defendant. The government attorney was insistent that no pleas be entered and the pleas as to both defendants be deferred. The government was represented by Clarence M. Condon, Assistant United States Attorney.

On or about February 21, 1956, Mr. Condon visited the petitioner at the County Jail relative to his waiving information in the matter of the alleged robbery of the Forest Bank (designated as Case No. 10348), and pleading guilty to both the Waterville (case no. 10345) and Forest (case no. 10348) bank robberies. The result of this interview was an agreement that the petitioner would waive indictment in case no. 10348 and plead guilty to both banks robberies, cases nos. 10345 and 10348. Mr. Condon promised that in consideration for the waiver and pleas the petitioner would receive a sentence not exceeding twenty (20) years in case no. 10345; and a sentence [fol. 10] not exceeding ten (10) years in case no. 10348 and that the sentence in the latter case would be served concurrently with the former. Mr. Condon also represented to the petitioner that the United States Attorney gave him the authority to make the agreement and implied that it was agreeable with the Court. Mr. Condon in-

structed the petitioner to advise his attorney that he was willing to waive indictment in the Forest Robbery and plead guilty in both cases. Mr. Condon also cautioned the petitioner not to advise his attorney of the visit and the agreement.

On February 24, 1956, the petitioner appeared in this Court and after waiving indictment in case no. 10348 pleaded guilty in both cases in accordance with his agreement with Mr. Condon. Sentence was deferred.

Thereafter, and before imposition of sentence the petitioner appeared as a witness in the case of a co-defendant. During that trial, and while the petitioner was testifying, he was warned by Mr. Condon that he would shortly be before the Court for sentence.

[fol. 11] On or about May 22, 1956, Mr. Condon again interviewed the petitioner at the County Jail. At that visit Mr. Condon advised the petitioner that because of his testimony, unfavorable to the government, the Judge was "vexed" and that there might be some difficulty in regards to the agreement regarding the aggregate sentence not exceeding twenty (20) years. The petitioner reminded Mr. Condon that the agreement was premised on his waiver of indictment and pleas of guilty; that nothing was ever said in regards to his testifying at the trial of his co-defendant. The petitioner also told Mr. Condon that he had kept his part of the bargain and as the government was reneging on its part of the bargain he was going to tell his attorney the whole story, and insist that it be brought out in open Court. Mr. Condon's reply was that the petitioner had nothing to worry about; that in the event the Court imposed a sentence in the excess of twenty (20) years, the United States Attorney, would move for a reduction within sixty (60) days of the portion exceeding twenty (20) years; that on the other hand if the petitioner insisted in making a scene there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the petitioner's difficulties.

[fol. 12] On May 23, 1956, the petitioner was sentenced by the Honorable Frank L. Kloebe to twenty-five (25) years in case no. 10345, and fifteen (15) years in case no. 10348. The sentences were ordered served consecutively.

Immediately after sentence was imposed, the petitioner was informed by Mr. Condon that as soon as the Judge "cooled off" the United States Attorney would have the sentence reduced to the promised twenty (20) years.

A few hours later the petitioner was on his way to the Leavenworth Penitentiary.

The promised reduction of the sentence was never executed.

Thereafter, the petitioner wrote two (2) letters to the sentencing Judge and two (2) letters to the Attorney General of the United States complaining of the overreaching and misrepresentations by Mr. Condon. The letters were mailed in the official Prisoner's mailbox. The petitioner has not received a reply to any of the aforesaid letters.

[fol. 13] ARGUMENT IN SUPPORT OF MOTION

JURISDICTION

This motion is made pursuant to Section 2255 of Title 28, United States Code which provided that a collateral attack on a judgment on constitutional grounds may be made at any time. *United States v. Hayman*, 342 U.S. 205.

I.

Petitioner's allegations that the waiver of indictment and pleas of guilty were obtained by promises and misrepresentations on the part of the attorney representing the government is a substantial allegation, and if sustained the petitioner is entitled to have the judgment, pleas, and waiver vacated. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213; *United States v. Rutkin*, 212 F. 2d 641. The aforesaid cases hold that misconduct by a prosecutor is grounds for vacation of the judgment. See also: *Gregory v. United States*, 233 F. 2d 907.

II.

The petitioner's allegation that he was coerced into [fol. 14] keeping from the Court and his Attorney the fact that his waiver and pleas of guilty had been obtained by promises by the Government Attorney fall into the

same category as the allegation set out in paragraph I above, e.g. misconduct and overreaching by the government attorney, and the cases there are applicable here.

III.

The allegation that the Court failed to act in conformity with Rule 11, Fed. Rule Crim. Proc. is supported by the Reporter's Transcript for February 24, 1956. The pertinent part of Rule 11 states:

"The court may refuse to accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge."

The Court made absolutely no inquiry as to whether the pleas were being voluntarily made and if they had been influenced by promises or threats on the part of government officers. Neither did the Court inquire if the petitioner [fol. 15] understood the consequences of his plea. The Court of Appeals for this Circuit stated at page 158 in the case of *Julian v. United States*, 236 F. 2d 155:

"In order to comply with the Rule the District Court need not follow any particular ritual. *The prerequisite is that the defendant understands the consequences of the plea.* *United States v. Swaggerty*, 7 Cir., 218 F. 2d 875. A brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of his knowledge." (Emphasis supplied).

In the case of *United States v. Mack*, 249 F. 2d 421, 423, the defendant's attorney entered the plea of guilty. The Court failed to inquire of the defendant if her plea was voluntarily given. The case was reversed.

In regards to a plea of guilty where the defendant was represented by Counsel, the case of *United States v. [fol. 16] Lester*, 247 F. 2d 496 is helpful as it is apposite to the instant case. There the Court stated:

"Even when the defendant is represented by counsel it has been held that the mere statement of the ac-

cused that he understands the charge against him does not relieve the Court of the responsibility of further inquiry"

In the light of the allegations set out in Points I and II it is evident that a penetrating and comprehensive examination of all the circumstances under which the pleas were made would have brought to the attention of the Court the overreaching and misrepresentations by the Assistant United States Attorney.

IV.

At the time of imposition of the sentences, the Court afforded the petitioner no "opportunity to make a statement in his own behalf and to present any information in mitigation of punishment," as provided in Rule 32 (a) F.R.Crim.P.

[fol. 17] At the time of imposition of the sentences, the Court asked petitioner's attorney if he had anything to say for the petitioner. The attorney responded that he had nothing to say as he had appeared before the Court on three previous occasions. The Court was satisfied with that explanation and proceeded with the sentencing process without inquiring of the petitioner if he had anything to say. There the Court was in error. Petitioner's attorney had not said a single word, during his representation, in mitigation of the punishment. In such circumstances, the Court should have offered the petitioner an opportunity to speak for himself—this was especially vital where the Court had in mind a sentence of forty (40) years. Rule 32(a) F.R.Crim.P. provides in pertinent part:

"Before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In *Couch v. United States*, 235 F. 2d 519, in regards to the Rule that the defendant be given an opportunity to speak stated at page 521:

[fol. 18] "Such a statement would be in addition to any made by counsel on behalf of the defendant, if counsel is minded to make a statement. The sentencing Judge can make the personnel opportunity clear by addressing as inquiry directly to the defendant, after hearing counsel if the latter desires to be heard."

The *Couch* case, *supra*, is distinguishable only because the attorney in that case did make a statement in mitigation and the Court heeded that statement to the extent of designating a reformatory instead of a penitentiary as the place for service of the sentence.

The Court (concurring division) stated further in the *Couch* case, *supra*, that:

"We wish also to make plain our own view that where the procedure now prescribed is not followed error occurs that requires resentencing in accordance with [fol. 19] Rule 32(a), certainly when the matter is brought before us on direct appeal, and in some circumstances, at least as to trials and convictions occurring after the rendition of today's opinion, when the question arises under section 2253, 62 Stat. 947." *Id.* 521.

"Rule 32(a), note 2, *supra*, has the force of law. . . . We think the Rule means, as it says, that before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present information in mitigation of punishment. . . . But the opportunity afforded must be personal, and it is not when, as here, the Judge asks only counsel if counsel has anything to say. . . . We think that where the Rule is not followed the error is not to be ignored as harmless. *Kotteakos v. United States*, 328 U.S. 750." *Id.* 522 (Emphasis Supplied.).

[fol. 20]

V.

The petitioner presents substantial allegations of fact pertaining to events in which he personally participated. A hearing is required at which the petitioner must be present to testify and present evidence in support of his allegations. *United States v. Hayman*, 342 U.S. 205;

Walker v. Johnson, 312 U.S. 275. Further because of the character of the allegations presented in Points I and II another problem faces the Court. The petitioner contends that the Assistant United States Attorney implied that the Court had knowledge of the agreement as to the amount of sentence to be imposed. "On these issues it is the petitioner's right to examine the Court under oath." *Davis v. United States*, 8 Cir., 210 F. 2d 118. Therefore it is questionable as to whether the sentencing Court should rule on the instant Motion. *United States v. Halley*, 240 F. 2d 418.

Wherefore, petitioner prays that the sentences imposed in the above entitled case be vacated along with the waiver and pleas.

/s/ John Machibroda
1373
Alcatraz, California

. . . .

[fol. 21]

AFFIDAVIT

John Machibroda, having been duly sworn according to law deposes and says that he is the petitioner in an action filed in this Court entitled "Motion To Vacate sentence" and this affidavit is made in support thereof:

1. That affiant was interviewed in the County Jail on or about February 21, 1956, by one Clarence M. Condon who represented himself to be as Assistant United States Attorney in charge of the prosecution of alleged bank robberies committed at the Waterville and Forest Banks. (Later designated as Cases 10345 and 10348). The County Jail where the interview took place is situated in Toledo, Ohio.

2. That the said Clarence M. Condon represented to the Affiant that he had the authority to speak for the United States Attorney and the United States District Judge in the matter of the amount of sentence that would be imposed in Cases Nos. 10345 and 10348.

[fol. 22] 3. That the said Clarence M. Condon represented to the Affiant that if the Affiant would waive in-

dictment in case no. 10348 and plead guilty in cases Nos. 10345 and 10348 the Court would not impose a sentence in the excess of twenty (20) years in Case No. 10345 and that any sentence imposed in Case No. 10348 would not be in the excess of ten (10) years and would be ordered served concurrently with the term imposed in case No. 10345.

4. That on the assurance of the said Clarence M. Condon that the sentences would be imposed as heretofore set out in paragraph 3, above, the Affiant agreed to waive indictment in case no. 10348 and plead guilty to both cases.* (This interview was held on or about February 21, 1956)

5. That the said Clarence M. Condon instructed the Affiant to advise his Attorney, John Schuchmann, that he would waive indictment in case no. 10348 and plead guilty to both cases.

6. That the said Clarence M. Condon cautioned the Affiant to refrain from advising the said John Schuchmann of his interviews with Mr. Condon and that an agreement [fol. 23] had been reached between the government as represented by Mr. Condon, and the Affiant in the matter of waiver, pleas and sentences.

7. That on February 24, 1956, Affiant acting on the promises and representations of the said Clarence M. Condon waived indictment in case no. 10348.

8. That on February 24, 1956, the Affiant acting on the premises and representations of the said Clarence M. Condon pleaded guilty in Cases Nos. 10345 and 10348.

9. That on or about May 22, 1956, the said Clarence M. Condon again interviewed the Affiant at the County Jail and informed Affiant that because of Affiant's unfavorable testimony at the trial of a co-defendant the Court was vexed and there might be some difficulty in regards to the promised twenty (20) years sentence.

10. That the said Clarence M. Condon admonished the Affiant that he had tried to warn him during the trial of

* At that time the affiant had already waived indictment in Case No. 10345.

the co-defendant that Affiant would shortly appear before this Court for sentence.*

[fol. 24] 11. That at no time did the Affiant ever represent to Mr. Condon or anyone else that he would testify one way or the other at the trial of the co-defendant. The promise of the maximum sentence of twenty (20) years was predicated solely on the Affiant's agreement to waive indictment and plead guilty to both informations.

12. That the Affiant immediately became agitated and hotly informed Mr. Condon that he was going to tell his Attorney the whole story and demand that the Court be informed of the agreement.

13. That the said Clarence M. Condon assured the Affiant that in the event a sentence in the excess of twenty (20) years was imposed the United States Attorney, himself, would move within sixty (60) days for a reduction of the portion of the sentence in excess of twenty (20) years; that the Affiant had nothing to worry about if he kept his mouth shut; that on the other hand, if Affiant insisted in making a scene in a matter of his own making, there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the Affiant's present difficulties.

14. That on May 23, 1956, the Affiant was sentenced [fol. 25] by the Honorable Frank L. Kloebe to twenty-five (25) years in Case No. 10345 and fifteen (15) years in case no. 10348.

15. That immediately after sentence in an interview with the said Clarence M. Condon, the Affiant was informed he had no reason to worry for as soon as the Judge "cooled off" the United States Attorney would have the sentence reduced to twenty (20) years as had been promised.

16. That within a few hours after sentence, the Affiant was on his way to the Federal Penitentiary, Leavenworth, Kansas.

17. That the sentence was not reduced in sixty (60) days and has not been reduced to date.

* The exact words Mr. Condon used to warn the affiant are to be found in the transcript of the trial of Marvin Ferris Breaton.

18. That the petitioner wrote two (2) letters to the Honorable Frank L. Klobb and two (2) letters to the Attorney General of the United States relative to the misrepresentations by the said Clarence M. Condon. These letters were posted in the official prisoner's mail box and the Affiant has failed to receive a reply to any of them. [fol. 26] 19. That the Affiant's previous experience with Court officials has been with the authorities representing the Canadian Government and he found them to honor their commitments. He had no reason to believe that the officials of the United States Courts would do otherwise. His naivete has cost him an extra twenty (20) years in prison.

/s/ John Machibroda
(Affiant)

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

VERIFICATION

John Machibroda, after having been duly sworn according to law, deposes and says that he has read the above and foregoing affidavit, and the contents therein are true to his best knowledge and belief.

/s/ John Machibroda
(Affiant)

Subscribed and sworn to before me this
3rd day of February, 1959.

(SEAL) /s/ J. B. Latimer
(Notary Public)

Associate Warden authorized by the Act of February 11, 1938 to administer oaths.

[fol. 27]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MEMORANDUM IN OPPOSITION TO MOTION TO VACATE—
Filed June 5, 1959

On February 9, 1959, John Machibroda, hereinafter referred to as "defendant", filed in this Court a Motion to Vacate Sentence with accompanying Affidavit purportedly under Title 28 U.S.C.A. Section 2255. These were filed in connection with the above numbered criminal cases. Because the record in these cases was forwarded by the Clerk of our District Court to the United States Court of Appeals, Sixth Circuit, at their request, concerning the case of Marvin F. Breton v. United States, Criminal No. 1034⁵ the United States was not in a position to oppose the Motion of the defendant at that time. Accordingly, this Court on March 12, 1959 ordered that the United States shall have twenty-five days after the record was returned to the Clerk of this Court to answer said Motion of the defendant. Thus, the reason for the delay.

Title 28 U.S.C.A. Section 2255 reads in part as follows:

"A prisoner in custody under sentence of a court . . . claiming . . . that the sentence . . . is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . ."

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

Before discussing and reviewing the allegations of the defendant is, it considered necessary to review the history of this case from its inception in this Court. The records of our Clerk of Court indicate that on or about January 25, 1956 the defendant represented by counsel appearing before Judge T. L. McCombs, Judge of the County of Wentworth, City of Hamilton, Canada, in the matter of an application for the extradition of defendant from [fol. 28] Canada to the United States of America, accused of the robbery of the First National Bank of Forest, Ohio, and the robbery of the Waterville State Savings Bank, Waterville, Ohio, that said defendant did waive his rights under the extradition act and consented to return to the United States of America as a prisoner to answer the charges concerning the above-mentioned robberies.

On February 17, 1956 the defendant appeared in this Court at arraignment with John J. Schuchmann, Esquire, and Dan H. McCullough, Esquire, counsel of his own choice. Exhibit "A" attached to this Memorandum is a copy of the transcript of what occurred at that time. Clarence M. Condon, former Assistant United States Attorney, proposed to file an Information of two counts charging the defendant and one Marvin F. Breaton with the robbery of the Waterville State Savings Bank, Waterville, Ohio and the concomitant jeopardy of the lives of various people in violation of 18 U.S.C.A. 2113 (a) (d). In Criminal No. 10345 the Information was read word for word and the Exhibit "A", page 2, indicates that copies of this proposed Information had been furnished to the defendant. Defendant's rights with regard to having his case presented to the Grand Jury was fully explained to him, Exhibit "A", pages 2 and 3, and counsel for the defendant stated that defendant would sign the waiver of the grand jury. Defendant also acknowledged that he desired to sign the waiver of the grand jury, Exhibit "A", page 3. Counsel for the defendant also indicated that he had examined the charges carefully and that he had con-

sulted with the defendant about the charges. Counsel for the defendant at that time indicated that he was aware that another Information regarding another bank robbery was being considered against the defendant and he requested that a plea not be entered at that time.

At arraignment the following week, February 24, 1956, defendant was again accompanied by counsel, Mr. Schuchmann. Exhibit "B", attached to this Memorandum is a copy of the transcript of what occurred at that time. An additional Information was proposed to be filed against the defendant of two counts, charging the defendant with the robbery of the First National Bank of Forest, Forest, Ohio, and the placing in jeopardy the lives of various people, in violation of 18 U.S.C.A. 2113 (a) (d). This is Criminal No. 10348. This two count Information was read word for word to the defendant. Again the defendant's rights with regard to having his case presented to the [fol. 29] Grand Jury was explained to him and the defendant stated his desire to waive the grand jury. Accordingly, the Information in Criminal No. 10348 was filed. Exhibit "B", page 2. At this time Mr. Schuchmann, counsel for the defendant and the defendant both expressed their desire to enter a plea of guilty by the defendant to Informations filed in Criminal No. 10345 and Criminal No. 10348, referred to above. The Court then asked for the pre-sentence report.

As the record indicates, the trial in the case of the United States v. Marvin F. Breaton, No. 10345, was tried before a Jury during the period May 1 to May 3, 1956. At that time the defendant took the stand in behalf of Mr. Breaton and testified that Mr. Breaton did not accompany him in the robbery of the Waterville State Saving Bank but that he was accompanied by an unknown person he had previously met. The Jury returned a verdict of "guilty" against Mr. Breaton on both counts.

On May 23, 1956 the defendant appeared before this Court for sentencing. A copy of the transcript of this hearing is attached as Exhibit "C". This Court inquired of counsel for the defendant as to whether or not he had anything to say in this matter, to which Mr. Schuchmann replied that he did not. Exhibit "C", page 1.

Thereupon, this Court reviewed the charges to which the defendant had entered a plea of guilty and also discussed his reason for sentencing. The defendant was given a total sentence of twenty-five (25) years in Criminal No. 10345, and a total sentence of fifteen years (15) in Criminal No. 10348, to be served consecutively for a total of forty (40) years.

Defendant claims that he is entitled to have his sentence vacated for the following reasons:

(1) He contends that he waived indictment in case No. 10348 and entered pleas of "guilty" in Criminal Cases No. 10348 and No. 10345 after reaching an agreement with former Assistant United States Attorney Clarence M. Condon that if he did so he would be sentenced to a maximum of twenty years' imprisonment instead of the total of forty years actually imposed. He represents that this agreement was made with the approval of the former Assistant United States Attorney and impliedly approved by the sentencing Court.

(2) Defendant alleges that he was restrained from bringing this agreement to the attention of his Attorney because of coercion by the former Assistant United States [fol. 30] Attorney and threats that if he did so there remained certain unsettled robberies which would be added to his problems.

(3) Defendant states that this Court erred in violation of Rule 11 of the Federal Rules of Criminal Procedure (F.R.C.P.) which requires it to inquire of the defendant at the time whether the pleas of guilty entered by him are voluntarily made with understanding of the nature of the charges.

(4) Defendant contends that this Court erred in violation of Rule 32 (a) Federal Rules of Criminal Procedure, by not affording him an opportunity to make a statement in his own behalf at the time of sentencing.

First, with respect to points (1) and (2) raised by the defendant, the undersigned respectfully refers the Court to the following cases:

United States v. Lowe, 173 F.(2d) 346 (2 C.A. 1949);
Crowe v. United States, 175 F.(2d) 799 (4 C.A. 1949);

United States v. Tacoma, 176 F.(2d) 242 (2 C.A. 1950);

Tabor v. United States, 203 F. (2d) 948 (4 C.A. 1953);

Meredith v. United States, 208 F. (2d) 680 (4 C.A. 1953).

In each of these cases prisoners had filed motions under 28 U.S.C.A. 2255, seeking to have their sentences vacated. There were contentions that collusion occurred between the Assistant United States Attorney and petitioner's counsel to induce the petitioner to plead guilty (*United States v. Lowe, supra*), or that the United States Attorney and the FBI made promises and threats to the petitioner to obtain the plea of guilty (*Crowe v. United States; Tabor v. United States* and *Meredith v. United States, supra*), or that petitioner and the Assistant United States Attorney entered into an agreement whereby petitioner would enter a plea of guilty in return for having two other indictments *nolle prossed* (*United States v. Tacoma, supra*). In each of these cases petitioner's motion to vacate sentence was denied. The Court in *United States v. Lowe, supra*, succinctly stated the fact that these allegations were false and phony in this way:

"We hold that a charge that a bargain had been made between the defendant's attorney and the Assistant United States Attorney—a charge that was never asserted at the time of the hearing before Judge Clancy nor apparently for over a year thereafter—which was neither verified nor supported in any way by the arguments submitted . . . was insufficient to require Judge Medina to grant the defendant's motion. We think the charge was evidently a mere afterthought. Had it any substance, the defendant would have protested at his sentence when it was imposed, and then and there have sought to withdraw his plea and to go on trial on the merits." 173 F.(2d) 346, at page 347.

[fol. 31] Such is the case here. If the defendant had entered pleas of guilty on the promise that he would have received twenty years; that the former Assistant United States Attorney would move for reduction of his

sentence within sixty days after it was discovered that defendant had received a sentence of forty years, the defendant would have clamored loudly at the end of sixty days to have his sentence reduced or to have his pleas of guilty withdrawn. Defendant did not do so, but waited until three (3) years later to submit false accusations. This not only leads to the conclusion that defendant is a perjurer, but his perjury at the time of the trial in the case of *United States v. Marvin F. Breton*, referred to above, in which the Jury totally disbelieved the defendant's story, is additional evidence of his false leanings.

While the case of *Hudson v. United States*, 164 F.(2d) 274, (5 C.A. 1947), did not arise under a motion to vacate, appellant Hudson stated that the Assistant United States Attorney had promised a specified sentence in return for a plea of guilty. In affirming Hudson's conviction the Court of Appeals noted that the Assistant United States Attorney with whom Hudson charged he made the agreement offered affidavits which showed that he had not made any such agreement.

Attached to this memorandum is an affidavit prepared by Clarence M. Condon, former Assistant United States Attorney against whom the defendant makes the allegations in his motion to vacate. Mr. Condon emphatically denies the allegations made by defendant in its entirety. He points out that after the plea of guilty by the defendant in March he contacted the defendant for several minutes on or about May 1, 1956, the day before the trial of Mr. Breton to find out whether or not the defendant would testify. This was a natural approach inasmuch as the defendant had plead guilty and the evidence in the files of the United States Attorney and the expected testimony was overwhelmingly that Breton had accompanied the defendant in the robbery of the Waterville Bank. Not only was this approach understandable but it is requested that in view of the criminal background of defendant, his perjury at the time of the trial of Breton, and the obvious false afterthought now presented, the Court can not but find that the affidavit prepared by Mr. Condon represents the truth.

[fol. 32] As to point (3) raised by the defendant, it is not contended that he did not understand the nature of the charges against him. He contends in substance that had the trial Court followed Rule 11, Federal Rules of Criminal Procedure, it would have ascertained that his pleas and waiver were not voluntarily made. If this Court finds under defendant's points (1) and (2) that he was not induced to plead guilty or waive indictment by promises and threats, it follows that the defendant had acted voluntarily. Furthermore, at the time of entering a plea of guilty to the two Informations discussed above, at pages 2 and 3, not only did defendant's Attorney, Mr. Schuchmann, enter a plea of guilty to both Informations, but this Court asked the defendant whether or not it was his desire to enter pleas of guilty, to which the defendant answered: "Yes, your Honor". (Exhibit D, page 3).

It was stated in *United States v. Davis*, 7 Cir., 212 Fed. (2d) 264, that a failure of the trial court to make a determination that the plea is made voluntarily and with full understanding of the charges would of itself be reversible error only in the absence of a showing that in fact the defendant understood the nature of the charges. It is only too apparent in this case that defendant did understand the nature of the charges. As was pointed out on page 1 of this Memorandum, on January 25, 1956 the defendant represented by counsel in Hamilton, Canada, waived extradition to the specific charges of robbery of both banks with which he was charged later in the two Informations filed in this Court. Also, on February 17 and February 24, 1958, the defendant appearing with counsel of his own choice, listened to the Informations read in Court word for word and counsel for the defendant indicated that he had examined the charges carefully and had consulted with the defendant about the charges. It is believed that this Court will also take notice that counsel representing the defendant is experienced and is a member of a law-firm in Toledo, Ohio, which handles a great number of criminal matters. It was held in *United States v. Shepherd*, 108 F.S. 721 (D.C. N.H. 1952) that it is not obligatory on the trial court to make inquiry under Rule 11, where the defendant is rep-

resented by counsel. See also *Barber v. United States*, 10 Cir., 227 F.(2d) 431; *United States v. Sturm*, 7 Cir., 180 F. (2d) 413, 416.

In point (4) defendant contends the trial court erred in not following Rule 32(a), F.R.Cr.P. by not permitting him to make a statement in his own behalf before imposing sentence. In *Sandroff v. United States*, 6 Cir., [fol. 33] 174 F.(2d) 1014, which was decided on direct appeal from the conviction, the same argument was made by the defendant. The Sixth Circuit ruled it was obvious Sandroff did not wish to make a statement at the time of sentencing. The trial court had inquired of him and his counsel if there was "anything further". The Court of Appeals could not hold, therefore, that the defendant had not been afforded an opportunity to make a statement. In *Calvaresi v. United States*, 10 Cir., 216 F. (2d) 891, (reversed on other grounds) the record showed no request by the defendants or their counsel asking permission to make statements at the time of sentencing. In this absence, the Court of Appeals could not say the defendants were not afforded an opportunity to be heard. See also *Baird v. United States*, 10 Cir., 250 F. (2d) 735; *United States v. Sousa*, S.D. N.Y., 158 F. Supp. 508; *Hudson v. United States*, C.A.D.C., 229 F. (2d) 36. Section 2255 of 28 U.S.C.A. does not require the production of the prisoner at the hearing on his motion to vacate sentence. Such presence rests within the discretion of the trial court. *Crowe v. United States*, *supra*; *Carrell v. United States*, 4 Cir., 173 F. (2d) 348; *Garcia v. United States*, 9 Cir., 197 F. (2d) 687.

It is submitted that there is no necessity to require the production of the defendant at a hearing on his motion to vacate sentence. As our Sixth Circuit Court of Appeals stated in the case of *Johnson v. United States*, 239 F.(2d) 698, at page 699:

"We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for re-

hearings based on obviously nebulous and false accusations. In this case, we are convinced that an oral hearing, if granted to the petitioner, could not remotely redound to his benefit. The cost to the Government in transporting dangerous prisoners of the type of the present petitioner, Johnson, an escape expert and dangerous gunman, is in our judgment against sound public policy in the enforcement of justice in criminal cases, where the grounds upon which the petition is based are so palpably incredible."

Defendant has requested that the sentencing Judge disqualify himself. In this connection we refer you to the case of *United States v. Halley*, 2 Cir., 240 F.(2d) 418, 419, discussing situations wherein the sentencing Judge may be a material witness to the 2255 hearing. It should be noted, however, that the Second Circuit points out that Halley's claim was not made in good faith or "with any basis of fact". Defendant Machibroda avers only that the [fol. 34] Assistant United States Attorney represented "that he had the authority to speak for the United States District Judge" in this matter. As in *Halley, supra*, there appears to be no basis in fact for Machibroda's claim.

Based on the above, it is submitted that sufficient reason exists for overruling the motion of defendant to vacate his sentence without a hearing and without requiring that he be returned from Alcatraz to Toledo, Ohio:

Respectfully submitted,

RUSSELL E. AKE
United States Attorney,

/s/ Richard M. Colasurd
RICHARD M. COLASURD
Assistant United States Attorney

CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 35]

[Title omitted]

STATE OF OHIO)
COUNTY OF LUCAS) SS:

AFFIDAVIT IN SUPPORT OF MEMORANDUM

CLARENCE M. CONDON, being first duly sworn, deposes and says:

I have been shown the Motion to Vacate Sentence and the Affidavit of John Machibroda filed in the above-entitled cases on February 9, 1959. Insofar as it relates to activities and conversations of Clarence M. Condon, the undersigned, it is false in its entirety and a complete fabrication containing not an iota of truth.

I was the Assistant United States Attorney in charge of the prosecution of John Machibroda for his participation in the robbery of the Bank at Forest, Ohio, and the prosecution of John Machibroda and Marvin Breaton for their participation in the robbery of the Bank at Waterville, Ohio. John Machibroda waived indictment and pleaded guilty on advice of counsel. His co-defendant in the Waterville Bank robbery denied guilt and elected to stand trial.

The situation was such that I could anticipate he would testify for the defendant Breaton at his trial, especially since although admitting his guilt, my information from the FBI Agent was that he would not discuss any details concerning the robbery. The one and only time I ever saw Machibroda outside the Courtroom was the afternoon before Breaton's trial was to start. I went to the County Jail to find out if, and to what, he would testify. The total conversation did not last more than a minute, or certainly not two, and I remember it in detail. I first [fol. 36] asked him if he planned to testify the next day. He answered he was not interested in testifying, that all he was interested in was his sentence. I then asked him if Breaton or his attorney requested that he testify for Breaton, whether he would do so. He answered that he was not interested in Breaton, that his only interest was in the amount of time he would get. I then asked him

what his testimony would be if I subpoenaed him for the Government. His answer was, "the truth, of course", with a smile. I said, "naturally, but what is the truth?" His answer was, "Now, Mr. Condon!", with such a grin and inflection that it caused us both to laugh. I then said, "Well, you seem interested in your sentence, so I'm providing you this last opportunity to take the stand and tell the truth of what happened, but I can't use you if I don't know how you'll testify. The Judge might well take in account your refusal to talk when he sentences you because you were there." That ended the conversation.

At the trial, Machibroda voluntarily testified for Breaton that his companion was someone he had picked up at a bar in Detroit the day before whom he did not know. That this absurd testimony was perjury was established by testimony of a companion in other bank robberies who testified overhearing Machibroda and Breaton talking and laughing over the details of the Waterville Bank robbery.

Other than as set out above, I never discussed the matter of plea of sentence with Machibroda; never approached or coerced him in any way or promised him a sentence of not over twenty years; never saw or spoke to him on the occasions set forth in his Motion or Affidavit, and never told him not to tell his attorney about non-existing interviews.

/s/ Clarence M. Condon

Sworn to before me and subscribed in my presence this 4th day of June, 1959.

(SEAL)

/s/ Elizabeth Miller
Notary Public
Lucas County, Ohio

My Commission Expires July 17, 1959

[fol. 37] EXHIBIT "A" TO MEMORANDUM

(Pleas) Cr. Nos. 10345

BANK ROBBERY

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA and MARVIN FERRIS BREATON

February 17, 1956

MR. CONDON: If the Court please, Mr. Schuchmann and Mr. McCullough appear here today and I am not quite certain which attorney represents which defendant here.

MR. MC CULLOUGH: Mr. Schuchmann represents Mr. Machibroda and I represent Mr. Breaton, but I will represent both for the purpose of this proceeding.

MR. CONDON: The Government proposes to file an information in two counts against these men.

The first count charges that:

"On or about April 30th, 1955 at Waterville, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, and MARVIN FERRIS BREATON, alias Breaton Marvin, alias Clarence R. Breaton, entered The Waterville State Savings Bank Company, Waterville, Ohio, with intent to commit in such bank a felony, in violation of the statutes of the United States, to-wit: larceny of property belonging to and in the care, custody and control of the said bank, the said, The Waterville State Savings Bank Company, being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposits thereof being insured.

"Count 2. On or about April 30th, 1955, at Waterville, in the Northern District of Ohio, Western Division, [fol. 38] JOHN MACHIBRODA, alias John Broad, alias Tony O'Hara, and MARVIN FERRIS BREATON, alias Breaton Marvin, alias Clarence R. Brea-

ton, by force and violence and by putting fear and jeopardizing the lives of the employes of The Waterville State Savings Bank Company, Waterville, Ohio, by the use of dangerous weapons, to-wit: a sawed-off shot gun and a revolver, unlawfully and feloniously took and carried away, with intent to purloin, property or money in the custody and control of said bank of the value exceeding \$100.00, to-wit: approximately \$28,083.17, the said, The Waterville State Savings Bank, being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposit thereof being insured."

At this time I want to hand counsel for Mr. Machibroda and Breaton copies of this information in which a slight change has been made in a copy of an information previously provided them. The change was relative to the unlawful and felonious intent at the time of entry into the bank. It is a very minor change.

Do you understand that these counts in the information charge you with serious felonies? The procedure would be to present this matter to a Grand Jury, the Grand Jury consisting of twenty-three men, who would consider the evidence submitted by the Government. If they saw fit, they would return an indictment against you and this indictment would constitute the charges upon which you would stand trial. If you want to dispose of your case as rapidly as possible, you can waive that procedure by [fol. 39] signing these waivers of indictment. That means the Government may file this information which I have just read to the Court, and that information would constitute the charges against you the same as an indictment would constitute the charges against you. If you desire, you may sign them.

MR. MC CULLOUGH: It is the desire of Mr. Machibroda and Mr. Breaton to sign the waivers, Your Honor. It might also be well if Mr. Condon asked the question of the defendants.

MR. CONDON: Is it the desire of each of you two gentlemen to sign the waivers that I have placed before you?

MR. MACHIBRODA: Yes.

MR. BRETON: Yes.

THE COURT: In the case of Mr. Machibroda, Mr. Schuchmann, have you examined the charges carefully?

MR. SCHUCHMANN: Yes, I have, Your Honor.

THE COURT: Have you consulted with your client about the charges?

MR. SCHUCHMANN: Yes, I have, Your Honor. I would like to say one thing on behalf of the defendant: I would like to defer entering a plea one way or the other at this time in order to talk to Mr. Condon about another charge, with a possibility of another information being [fol. 40] filed against Mr. Machibroda. In any event, at the present time it isn't likely that in all probability the defendant would enter a plea of guilty to both charges in both informations.

MR. CONDON: Your Honor, I talked to Mr. McCullough about 10:00 o'clock this morning, just as we were about to start court.

MR. MC CULLOUGH: We called at Mr. Condon's office this morning and he was with the Court. We were there at 9:30.

MR. CONDON: I will say for the record that I think with that statement that can be accomplished at the arraignment next Friday.

THE COURT: So that you do not object to a continuance of the matter on the pleas, is that correct?

MR. CONDON: That is right.

THE COURT: Is that true also with Mr. Breaton?

MR. MC CULLOUGH: As to Mr. Breaton, we wish to enter a plea of not guilty at this time, or if the Court wants to defer that until next Friday, that will be all right; whatever the District Attorney and the Court would like to do, but we intend to enter a plea of not guilty and have the matter placed in the Jury assignment.

THE COURT: There is no reason why the plea of not guilty should not be entered at this time then.

[fol. 41] MR. MC CULLOUGH: The only reason I made the remark, Your Honor, is because where there are co-defendants the Court will not take one plea in one case and another plea in the other.

MR. CONDON: I would like the matter of the date being set to be deferred at this time.

THE COURT: It will have to be. I am not in a position at this time to set a date.

MR. MC CULLOUGH: We don't expect the Court to fix a date at this time.

THE COURT: What bond was fixed in these cases?

MR. MC CULLOUGH: \$50,000.00.

THE COURT: Those bonds will be continued. In the case of Machibroda, his case may be called next Friday at 10:00 o'clock.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 42] EXHIBIT "B" TO MEMORANDUM

(Plea) Cr. No. 10345

BANK ROBBERY, Waterville, Ohio

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara

February 24, 1956

MR. CONDON: If the Court please, last week an information was filed charging John Machibroda and Marvin Breaton with the bank robbery at the Waterville State Savings Bank. It was filed insofar as Breaton was concerned, and a waiver of indictment was filed at that time, and also a plea on behalf of Breaton of not guilty was entered.

At this time the Government would like to file the information as it pertains to John Machibroda, who appears here with his counsel, John Schuchmann, who has been furnished with a copy of the information, and if it is the desire of the Court, the defendant or counsel we could dispense with the reading of it today.

MR. SCHUCHMANN: That is correct.

THE COURT: Do you have a copy of it, Mr. Schuchmann?

MR. SCHUCHMANN: Yes, I have. And the defendant has a copy.

MR. CONDON: So that the purpose of the arraignment today is to waive, —I beg your pardon, Your Honor. It was filed properly last week, but no plea then was entered insofar as Machibroda is concerned. He is here for plea.

THE COURT: Are there two charges here?

[fol. 43] MR. CONDON: The next case pertains to the Forest Bank Robbery.

THE COURT: Do you want to file that?

MR. CONDON: I will offer that at this time, Your Honor. That information charges John Machibroda alone, and it is in two counts. (Thereupon, Mr. Clarence M. Condon, Assistant United States Attorney, read the said information to the defendant in open Court.)

Do you understand, Mr. Machibroda, that each of these two counts that I have just informed the Court about charges you with a felony and the ordinary procedure would be to present the matter to a Grand Jury. If the Grand Jury saw fit, it would return an indictment against you and that indictment would constitute the charges upon which you would stand trial. If you want to permit the Court to proceed with the disposition of your case, you could consent to the filing of this information that I have just read to the Court by signing the waiver of indictment that I place before you.

THE COURT: That is your desire, is it, Mr. Machibroda, that you sign that waiver?

MR. MACHIBRODA: Yes, Your Honor.

THE CLERK: The waiver has been signed.

THE COURT: As I understand the situation, there are now two informations here, one charging in effect the holding up of the Waterville Bank and the other the Forest Bank, is that correct?

[fol. 44] **MR. CONDON:** That is correct, Your Honor, two banks.

THE COURT: How do you plead to the charge as to the Waterville institution, guilty or not guilty?

MR. SCHUCHMANN: Guilty, Your Honor.

THE COURT: Is that your desire, Mr. Machibroda?

MR. MACHIBRODA: Yes, Your Honor.

THE COURT: And in connection with the Forest Bank information what is the plea?

MR. SCHUCHMANN: Guilty, Your Honor.

THE COURT: Is that your desire, Mr. Machibroda?

MR. MACHIBRODA: Yes, Your Honor.

THE COURT: I think I would like to have a presentence report in this case. How long would that take, Mr. Sell?

MR. SELL: It may take a couple weeks, Your Honor.

MR. CONDON: It might take a considerable period of

time because Mr. Machibroda is a Canadian citizen and possibly Mr. Sell may find it necessary to write there.

THE COURT: Yes. I would like to have the report and we will delay further steps until that report is received. Bond will be continued.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 45] EXHIBIT "C" TO MEMORANDUM

(Sentence) Cr. Nos. 10348 & 10345

BANK ROBBERY,
FORREST AND WATERVILLE, OHIO

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

May 23, 1956

THE COURT: Does counsel for the defendant have anything to say in this matter?

MR. SCHUCHMANN: No, Your Honor, I believe this is my fourth appearance here with the defendant.

THE COURT: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas. You have entered a plea of guilty under the information charging you with having entered the First National Bank of Forest, Ohio, with intent to commit in such bank a felony. That was on November 22, 1955, and in the second count you are charged with having used force and violence in that bank. That is Count Two. You have entered a plea of guilty along with Breton to a charge of entering the Waterville State Savings Bank on April 30, 1955, and in Count Two of that information by force and violence obtaining money there.

I have studied the reports in your case and I come up with these figures: That while Mr. Breton was your partner at Waterville, Ohio, and at the Colby, Wisconsin Bank he shared in some \$63,000.00, but at the same time you participated in bank robberies at Waterville, the First National Bank of Forest, the Trotwood Exchange Bank at Canal Fulton, and at the Bank in Colby, Wis- [fol. 46] consin, Mr. Hammill was your partner in four of those cases, Mr. Breton in two of them. I find your total loot in the five cases that I have before me here amounts to \$169,432.54. That is quite a business for a

young man to be in. You are twenty-six years old. I don't think you are ever going to correct yourself. I think you as well as your partner Breaton ought to be kept confined until you are between fifty and sixty years old. Perhaps by that time with cooler blood in your veins you will be able to live with people as human beings. I don't know, but I do know society needs protection from you. This thing of going in with guns and intimidating helpless and defenseless women may appear to you to be a smart thing to do. To my mind, it is a cowardly thing to do. It is the most cowardly thing a man could engage in. It is easy enough to shove women around and easy enough to shove elderly men around where you take them by surprise with a gun. That is not bravery; that is cowardice.

In your case, in Case Number 10345,—that is the Waterville State Savings Bank,—there will be a sentence of twenty-five years on Count Two and a sentence of twenty years on Count One, to be served concurrently. Those are the maximum sentences that the law provides in that case.

In the case of the Forest Bank, Case Number 10348, there will be a sentence of fifteen years on Count Two and fifteen years on Count One, those two counts to be served not concurrently but consecutively to Count Two in Case Number 10345, making a total sentence of forty years.

That will be all.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

PETITIONER'S REPLY TO THE MEMORANDUM IN OPPOSITION
TO MOTION TO VACATE—Filed June 22, 1959

1. The government opposes the motion under the doctrine of laches. This is predicated on the fact that the instant motion was filed some three years after imposition of the sentences. Such an opposition to a collateral attack grounded on a constitutional infringement must fail. *Herman v. Claudy*, 350 U.S. 116; *Urege's v. Penna.*, 335 U.S. 437; *Palmer v. Ashe*, 342 U.S. 134. In a recent opinion, the Supreme Court in *Heflin v. United States*, 79 S.Ct. 451, in speaking of Section 2255, stated at page 454:

"The statute further provides:

"A Motion for such relief may be made at any time. This latter provision simply means that as in habeas [fol. 48] corpus, there is no statute of limitations, no *res judicata*, and the doctrine of laches is inapplicable."

2. The cases cited at page 4 of the government's Memorandum are all inapposite. These are cases which involve decisions *after* a hearing or where the allegations *were not dehors the record*.

The case of *Johnson v. United States*, 239 F. 2d 698 involved conclusions of the defendant and other issues not within the scope of Section 2255. Also, *Johnson* is distinguishable from the instant case in that *Johnson* had the benefit of a trial by jury.

3. The Attorney for the government bottoms his principal objection to petitioner's allegations on his conclusion that the petitioner is a perjurer. This conclusion is apparently arrived at by the fact that the petitioner testified adversely to the government during the trial of a co-

defendant. It is of note that no charge of perjury has been made against the petitioner until now.

[fol. 49] 4. In the government's Memorandum it is also claimed that the Affidavit of the petitioner is false and the one of Clarence M. Condon true. As Mr. Condon was an active participant in the events the petitioner complains of, the facts are put in controversy. The petitioner swears one thing happened at the interviews with Mr. Condon, and Mr. Condon gives a different version. The Affidavit of Mr. Condon is a tacit admission of a portion of petitioner's allegations. It requires cross-examination under oath. The Court of Appeals for this Circuit holds that factual issues *dehors* the record may not be controverted by *ex parte* affidavits. In *Teller v. United States*, 203 F. 2d 871, 6 Cir., in a case strikingly similar to the one at bar, the Court held:

"Even if they are considered as being controverted, they present a factual issue which can not be resolved by the files and records of the case, thus making it necessary that the District Judge hold a hearing and make findings of fact and conclusions of Law with respect thereto. Sec. 2255, Title 28, U.S. Code; *U.S. v. Hayman*, 342 U.S. 205, 219-220, 72 S.Ct. 263, 96 L. Ed. 232.

[fol. 50] In *United States v. Capsopa*, 260 F. 2d 566, that Court held at page 568:

" * * * The weight to be attributed to the testimony of the various witnesses can best be determined upon a hearing."

"In final analysis, both appellant and the government should be better satisfied after a hearing * * *." *Id.*

"In our opinion a hearing should have been granted and the decision denying it should be reversed." *Id.*

See also: *United States v. Morin*, 265 F. 2d 241; *Shelton v. United States*, 1958, 356 U.S. 26; *Kay v. United States*, 233 F. 2d 443-444, 6 Cir.; *Thomas v. United States*, 6 Cir., 217 F. 2d 494; *Slack v. United States*, 6 Cir., 196 F. 2d 493; *Howard v. United States*, 6 Cir., 186 F. 2d 778; *Walker v. Johnson* 312 U.S. 275; *Zanada v. United States*, 78 S. Ct. 383.

[fol. 51] 5. The cases cited by the government in its opposition to petitioner's contention that the Court did not act in conformity with Rule 32(a), F.R.C.P. are not apposite under the facts of the case at bar. Here, this allegation must be viewed in the light of the allegations set out under points I and II. The government may not now argue that the petitioner was afforded an opportunity to bring the pertinent facts to the attention of the Court.

6. As to Point III, the petitioner refers the Court to the case of *United States v. Mack*, 249 F. 2d 421, where the Court stated:

"In this case the District Court failed entirely to comply with the requirements of Rule 11 and the defendant-appellant Helen Mack is entitled to be heard on her motion to vacate the judgment of conviction . . . It was error for the District Court, under the circumstances, to summarily deny the motion without a hearing thereon."

[fol. 52] The defendant *Mack* was represented by counsel of her choice at the time she entered the plea of guilty.

7. The petitioner merely questioned the propriety of the sentencing judge in Ruling upon the instant motion. It is his allegation that the Government attorney implied the questioned agreement had the approval of the Judge. It is the petitioner's right to examine the judge on this question. *Davis v. United States*, 8 Cir., 1954, 210 F.2d 118. It has been suggested by other Courts that when a judge may be called as a material witness, it would be best that he disqualify himself. In re Murchison, 1955, 349 U.S. 133, 138-139; *United States v. Halley*, 240 F.2d 418.

CONCLUSION

It is respectfully submitted that the instant allegations require a hearing at which the petitioner is present. *United States v. Hayman*, 342 U.S. 205.

/s/ John Machibroda
(Petitioner)

[fol. 53]

CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 54]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MEMORANDUM OF THE COURT RE MOTION OF DEFENDANT
TO VACATE SENTENCES—September 30, 1959

Kloeb, J.

These matters come before the Court on a Motion of the defendant to Vacate Sentences, under the provisions of Section 2255, Title 28, U. S. C. A., on the Memorandum in Opposition to the Motion, with exhibits attached, and the defendant's Memorandum in Reply thereto, and on the files and records of these cases. The files and records, including transcripts of defendant's several appearances before this Court, indicate the following:

On January 25, 1956 the defendant, represented by counsel, appeared before Hon. T. L. McCombs, Judge of the County of Wentworth, City of Hamilton, Canada; waived his rights to the extradition act and consented to return to Toledo, Ohio, as a prisoner to answer to bank robbery charges forming the basis of his later appearance and sentencing before this Court.

The transcript of proceedings of February 17, 1956 indicates that the defendant appeared before this Court and was represented at that time by John J. Schuchmann, Esquire, and Dan H. McCullough, Esquire, counsel of his own choice. Clarence M. Condon, former Assistant United States Attorney, proposed to file an Information of two counts charging the defendant and one Marvin Ferris Breaton with the robbery of the Waterville State Savings Bank, Waterville, Ohio, and the jeopardizing of the lives of the employees of said Bank by the use of dangerous weapons, in violation of 18 U.S.C.A. 2113(a) and (d). This is Criminal No. 10345. The Information was read word for word although it was indicated that copies

of this proposed Information had been previously forwarded to the defendant. After explaining to the defendant his rights with regard to having this case pre-[fol. 55] sented to the Grand Jury, counsel for the defendant stated that the defendant would sign the Waiver of Grand Jury. Defendant also stated that he desired to sign the Waiver of the Grand Jury. It was also indicated that counsel for the defendant had examined the charges carefully and that they had discussed with the defendant the charges of the Information. Accordingly, the Information as to Criminal No. 10345 was filed.

Counsel for the defendant stated that they were aware that another charge of bank robbery was being considered against the defendant and requested that a plea as to Criminal No. 10345 be deferred at that time.

Transcript of proceedings dated February 24, 1956 indicate that the defendant again appeared before this Court accompanied by his counsel, John J. Schuchmann, Esquire. An additional Information was proposed to be filed against the defendant of two counts, and charging the defendant with the robbery of the First National Bank of Forest, Forest, Ohio, and the jeopardizing of the lives of the employees of said Bank, in violation of 18 U.S.C.A. 2113(a) and (d). This is Criminal No. 10348. Again, the two count Information was carefully read to the defendant and his rights with regard to having the case presented to the Grand Jury was fully explained to him and again with his counsel defendant indicated his desire to waive the Grand Jury. Accordingly, the Information as to Criminal No. 10348 was filed. At this time counsel for the defendant and the defendant himself expressed their desire to enter a plea of guilty by the defendant to the Information filed, Criminal No. 10345 and Criminal No. 10348. After the acceptance of said pleas of guilty this Court then referred the matters to the Probation Officers for a presentence report.

The trial of the case of United States v. Marvin Ferris Breaton, the co-defendant in Criminal No. 10345, was tried to a jury from May 1, 1956 to May 3, 1956. The defendant testified in behalf of Mr. Breaton which, to the best of this Court's recollection, was that the defendant had admitted the robbery of the Waterville Bank, but

that the defendant ~~was~~ accompanied by another individual and not by the co-defendant Breaton. Obviously, the Jury did not accept the defendant's account of the bank robbery and returned a verdict of Guilty against Breaton on both counts.

On May 23, 1956 a transcript of proceedings reveal that the defendant appeared before this Court for sentencing. This Court inquired of counsel for the defendant as to whether or not he had anything to say in this matter, to which Mr. Schuchmann replied that he did not. Thereupon, the charges to which the defendant had entered [fol. 56] a plea of guilty were reviewed and a sentence of twenty-five years imposed in Criminal No. 10345, and a sentence of fifteen years imposed in Criminal No. 10348, said sentences to be served consecutively. 40-403

The allegations raised by the defendant in his Motion to Vacate appear to be four in number. The first two will be reviewed at this time. Defendant contends that his pleas of guilty were entered after receiving a promise from former Assistant United States Attorney Clarence M. Condon that the defendant would receive a sentence of no more than twenty years. Defendant secondly alleges that he was restrained from bringing this so-called agreement to the attention^o of his attorneys because of coercion by the former Assistant United States Attorney that if he, the defendant, did reveal this understanding between themselves, certain other unsettled bank robberies would be added to defendant's problem. Defendant also alleges that after receiving the sentence of forty years the former Assistant United States Attorney promised to file a Motion for Reduction of Sentence within sixty days. Under oath, Clarence M. Condon, former Assistant United States Attorney, emphatically denies these allegations. In conjunction with these allegations the defendant states that he wrote two letters to this Court informing it of the above-mentioned promises. This Court did not receive two letters from the defendant. It did receive one letter, which is very revealing and which will be referred to later.

These charges of an agreement between a former Assistant United States Attorney and the defendant are serious. If this Court had any doubt as to their falsity

it would require a hearing, but the following inference to be drawn, together with the letter which this Court received from the defendant under date of November 30, 1956, conclusively indicates the falsity of the defendant's allegations.

Freedom is one of the greatest joys and assets of every human. If it be true that former Assistant United States Attorney Clarence M. Condon had made these promises and had promised to move for reduction of defendant's sentence from forty years to twenty years within sixty days after sentence was imposed, the failure of the Federal Attorney to so move for reduction of sentence would have brought forth a cry of anger and anguish from the defendant. But the defendant remained silent from the date of sentence on May 23, 1956 to the [fol. 57] time of filing of his Motion to Vacate Sentence on February 9, 1959, a time interval of shortly less than three years. Apparently, it took the defendant three years to concoct these charges. In addition, the evidence which conclusively leads this Court to consider the allegations of defendant to be false is a letter which the defendant addressed to this Court, dated November 30, 1956, more than six months after imposition of sentence. A copy of this letter is attached to this Memorandum and reads as follows:

"Your Honor:

On May 23rd, 1956, I stood before your court and was sentenced by you, to a term of forty years imprisonment for bank robbery. (Case number—10345 and 10348.) You having been associated for so long a time with a part of our emotional world, are faced with a great task of dealing with human lives and the handing down of extremely important decisions. I am unbiased by the decision you arrived at but, if I may be so bold, the purpose of a prison sentence is two-fold.

1. Is a correction measure in the hope that, with a reasonable sentence, the accused will straighten up and become an accepted—even useful—citizen.

2. To put the accused away for good because there seems no chance that he could ever be a law-abiding person.

My feeling is that you chose the latter because you could see no alternative. Because of my obduracy and foolish pride all you could see was a young maniac with no apparent respect for authority and so you thought I was immutable. We are all split personalities—varying in degree and I was judged wholly on the side I turned to you. I am hardly in a position to glorify myself or to be showered by laudable praises, however, I have a humility and belief in a supreme power, a love and longing for a home with children (to my mind the most important of social instincts); A great desire to again be accepted by our society whom I flouted and am truly sorry for doing so. Undoubtedly my knowledge of law is very naim but I believe that our law to-day represents, not only authority, but justice, in the true sense of the word. We have progressed a long way since the days when a man could be hung for stealing a loaf of bread. You being a Federal Judge and a man of intelligence, integrity and humility, and it is my belief that you will give a man a break if he is deserving of it. Needless to say, forty years is a lifetime in itself, and should a man serve out such a sentence he would be in a complete state of stupefaction, of little worth held. I urge you to reconsider my case in the hope that you would consider making my two sentences concurrent. Presently, my life seems to be literally terminated. Since my incarceration I have felt the worth of fortunes might, feeling the torments of Hell itself. I am being very veracious when I say my goal is to live again amongst society as a respectable citizen. I no longer look on life as something flippant and look to you for a chance, so that I may prove myself. A complete retrospect of my life would reveal to you, that I [fol. 58] have the "possibilities of living with my fellow man as a human being. If my thoughts could but be read, so I could fully convince you of my sin-

cerity, I shall await your acknowledgement of my letter with great anxiety and trusting you shall give my case some consideration.

Very respectfully yours,

(signed) John Machibroda
73409"

In reply thereto this Court, through the United States Probation Officer, directed a letter to the defendant which reads as follows, and a copy of which is attached hereto:

"December 20, 1956

Mr. John Machibroda, No. 73409
Box 1200
Leavenworth, Kansas

Dear Mr. Machibroda:

Your letter of November 30 to Judge Frank L. Kloeb has been referred to us for a reply.

The Judge requested use to inform you that he has no further jurisdiction in your case, and that your case is now strictly in the hands of the Federal Parole Board. Therefore, Judge Kloeb is unable to take any further action in your case.

As you, undoubtedly, know, you will be eligible for parole consideration when you have served one-third of your present sentence. The granting or denying of parole is strictly a prerogative of the Federal Parole Board. Therefore, we cannot speak for them.

Very truly yours,

Jesse T. Sell
U. S. Probation Officer"

JTS:bp

The letter of the defendant contains a plea to have his sentences adjusted downward to twenty-five years (not twenty years) because he claims a change in himself to the better to be able to live with his fellow-men. At no place in this letter does the defendant make any allegations with reference to an agreement made with the former Assistant United States Attorney prior to sentence. Apparently, this is a sincere letter from a man who has finally become aware of what his former transgressions to society have created for him. No other conclusion can be drawn but that defendant's allegations in his Motion to Vacate Sentence are mere afterthoughts—afterthoughts in an attempt to gain his freedom. As was succinctly stated in *United States v. Lowe*, 173 F (2d) 346, (2 C.A. 1949) at page 347:

[fol. 59] "We hold that a charge that a bargain had been made between the defendant's attorney and the Assistant United States Attorney—a charge that was never asserted at the time of the hearing before Judge Clancy nor apparently for over a year thereafter—which was neither verified nor supported in any way by the arguments submitted . . . was insufficient to require Judge Medina to grant the defendant's motion. We think the charge was evidently a mere afterthought. Had it any substance, the defendant would have protested at his sentence when it was imposed, and then and there have sought to withdraw his plea and to go on trial on the merits."

The third allegation of defendant is that this Court did not adhere to Rule 11 of the Federal Rules of Criminal Procedure by not inquiring of the defendant at the time he entered his pleas of guilty as to whether or not they were voluntarily made by him, and whether or not he understood the nature of the charges. This allegation of the defendant is unfounded. The Court observes that the defendant was represented constantly by counsel of his own choice during all stages of the proceedings. The Court further observes that the counsel so selected by defendant are lawyers of repute, especially in matters of criminal law. Counsel informed this Court, as is set

forth by the transcript of proceedings that they fully discussed the nature of the charges with defendant. At the time of entering pleas of guilty to the two Informations filed against the defendant, not only did defendant's attorney, Mr. Schuchmann, enter a plea of guilty in behalf of the defendant, but this Court inquired of the defendant whether or not it was his desire to enter pleas of guilty, to which the defendant answered in the affirmative. Furthermore, prior to his appearance in this Court, the defendant was represented by counsel in Hamilton, Canada, and waived extradition to the charges of bank robbery to which he was later charged in the Informations filed in this Court. There is no question but that the defendant voluntarily and with full understanding entered his pleas of guilty to the Informations filed in these cases.

The fourth and last allegation of defendant is that this Court did not afford him an opportunity to make a statement in his own behalf. On May 23, 1956, defendant's fourth appearance before this Court, inquiry was made of defendant's counsel as to whether or not he had anything further to say. Mr. Schuchmann replied that he had nothing further to add. This Court then reviewed the charges to which defendant had entered pleas of [fol. 60] guilty; sentences were imposed and the reasons for the sentences were discussed before the defendant. Under a similar situation our Sixth Circuit U. S. Court of Appeals in *Sandroff v. United States*, 174 F (2d) 1014, affirmed the conviction of the defendant.

Accordingly, it is conclusively shown that defendant is entitled to no relief. Furthermore, he is not entitled to be returned to this Court for a hearing. As our Sixth Circuit U. S. Court of Appeals stated in *Johnson v. United States*, 239 F(2d) 698, at page 699:

"We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for rehearings based on obviously nebulous

and false accusations. In this case, we are convinced that an oral hearing, if granted to the petitioner, could not remotely redound to his benefit. The cost to the Government in transporting dangerous prisoners of the type of the present petitioner, Johnson, an escape expert and dangerous gunman, is in our judgment against sound public policy in the enforcement of justice in criminal cases, where the grounds upon which the petition is based are so palpably incredible."

We are of the opinion that the files and records of these cases show conclusively that the petitioner is entitled to no relief and that his Motion to Vacate Sentences ought to be and is overruled.

An Order is drawn accordingly.

/s/ Frank L. Klobb
UNITED STATES DISTRICT JUDGE

[fol. 61] ATTACHMENT TO MEMORANDUM

From John Machibroda
P.M.B. 73409

Nov. 30/56

To Judge F. L. Klobb U. S. District Court, Toledo, Ohio
Your Honor:

On May 23rd, 1956, I stood before your court and was sentenced by you, to a term of forty years imprisonment for bank robbery. (Case number—10345 and 10348.) You, having been associated for so long a time with a part of our emotional world, are faced with a great task of dealing with human lives and the handing down of extremely important decisions. I am unbiased by the decision you arrived at but, if I may be so bold, the purpose of a prison sentence is two-fold.

1. Is a correction measure in the hope that, with a reasonable sentence, the accused will straighten up and become an accepted—even useful—citizen.

2. To put the accused away for good because there seems no chance that he could ever be a law-abiding person.

My feeling is that you chose the latter because you could see no alternative. Because of my obduracy and foolish pride all you could see was a young maniac with no apparent respect for authority and so you thought I was immutable. We are all split personalities—varying in degree and I was judged wholly on the side I turned to you. I am hardly in a position to glorify myself or to be showered by laudable praises, however, I have a [fol. 62] humility and belief in a supreme power, a love and longing for a home with children (to my mind the most important of social instincts); A great desire to again be accepted by our society whom I flouted and am truly sorry for doing so. Undoubtedly my knowledge of law is very naive but I believe that our law to-day represents, not only authority, but justice, in the true sense of the word. We have progressed a long way since the days when a man could be hung for stealing a loaf of bread. You being a Federal Judge and a man of intelligence, integrity and humility, and it is my belief that you will give a man a break if he is deserving of it. Needless to say, forty years is a lifetime in itself, and should a man serve out such a sentence he would be in a complete state of stupefaction, of little worth held. I urge you to reconsider my case in the hope that you would consider making my two sentences concurrent. Presently, my life seems to be literally terminated. Since my incarceration I have felt the worst of fortunes might, feeling the torments of Hell itself. I am being very veracious when I say my goal is to live again amongst society as a respectable citizen. I no longer look on life as something flippant and look to you for a chance, so that I may prove myself. A complete retrospect of my life would reveal to you, that I have the possibilities of living with my fellow man as a human being. If my thoughts could but be read, so I could fully convince you of my sincerity, I shall await your acknowledgement of my letter with great anxiety and trusting you shall give my case some consideration.

Very respectfully yours, /s/ John Machibroda
73409

[fol. 63]

ATTACHMENT TO MEMORANDUM

December 20, 1956

Mr. John Machibroda, No. 73409
Box 1200
Leavenworth, Kansas

Dear Mr. Machibroda:

Your letter of November 30 to Judge Frank L. Kloeb has been referred to us for a reply.

The Judge requested us to inform you that he has no further jurisdiction in your case, and that your case is now strictly in the hands of the Federal Parole Board. Therefore, Judge Kloeb is unable to take any further action in your case.

As you, undoubtedly, know, you will be eligible for parole consideration when you have served one-third of your present sentence. The granting or denying of parole is strictly a prerogative of the Federal Parole Board. Therefore, we cannot speak for them.

Very truly yours,

Jesse T. Sell
U. S. Probation Officer

JTS:bp

[fol. 64]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Criminal No. 10345

Criminal No. 10348

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

ORDER OVERRULING MOTION TO VACATE SENTENCES—
Filed September 30, 1959

These matters having come before this Court on the Motion of John Machibroda to Vacate Sentences, together with accompanying Affidavit, the Memorandum in Opposition of the United States, together with an Affidavit of a former Assistant United States Attorney and transcripts of pertinent proceedings, and a Reply thereto, it is the opinion of this Court that said Motion and the files and records of these cases conclusively show that John Machibroda is not entitled to the relief sought.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the Motion to Vacate Sentences is hereby overruled.

/s/ Frank L. Kloeb
UNITED STATES DISTRICT JUDGE

[fol: 65]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

No. 14,087

JOHN MACHIBRODA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORDER AND JUDGMENT—June 6, 1960

Before MARTIN, WEICK and O'SULLIVAN, Circuit Judges.

This cause has been heard and considered upon appeal from the order of the United States District Court denying the motion to vacate sentences aggregating forty years, imposed for bank robbery.

We think District Judge Kloeb acted with due discretion in the matter and that, upon the facts confronting him, he properly applied the doctrine of this court pronounced in *Johnson v. United States*, 239 F. (2d) 698, 699 (C. A. 6), which was quoted by the district judge in his opinion. See, also, *Sandroff v. United States*, 174 F. (2d) 1014 (C. A. 6). We think the instant case differentiates on its facts from *Teller v. United States* (1959), 263 F. (2d) 871 (C.A. 6).

The order of the United States District Court is affirmed.

ENTER:

/s/ John D. Martin
United States Circuit Judge

[fol. 66]

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 67] **SUPREME COURT OF THE
UNITED STATES**

No. 250 Misc., October Term, 1960

JOHN MACHIBRODA, PETITIONER

VS.

United States

**ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND GRANTING PETITION FOR WRIT OF
CERTIORARI—March 20, 1961**

**ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Sixth Circuit.**

**ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be,
and the same is hereby, granted. The case is transferred
to the appellate docket as No. 834 and placed on the
summary calendar.**

March 20, 1961